UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/926,586	11/21/2001	Anna Berggren	216110USOPCT	7996

22850 7590 12/29/2004

OBLON, SPIVAK, MCCLELLAND, MAIER & NEUSTADT, P.C.
1940 DUKE STREET
ALEXANDRIA, VA 22314

EXAMINER	
PRATT, HELEN F	

ART UNIT	PAPER NUMBER
1761	

DATE MAILED: 12/29/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

S/N

Office Action Summary	Application No.	Applicant(s)	
	09/926,586	BERGGREN ET AL.	
	Examiner	Art Unit	
	Helen F. Pratt	1761	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *03 November 2004*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *14-37* is/are pending in the application.

4a) Of the above claim(s) _____ is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *14-21,24-29 and 32-37* is/are rejected.

7)☒ Claim(s) *22, 23, 30, 31* is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application (PTO-152)
6) ☐ Other: _____.

DETAILED ACTION

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for a patent.

Claims 14 is rejected under 35 U.S.C. 102(a) as being anticipated by Connolly (US 2002/0090416 A1).

Connolly discloses that it is known as in claim 14 to use probiotic bacteria to enhance metabolic processing from the gastrointestinal tract using acidophilus bacteria or other lactic acid producing bacteria (abstract). The probiotic organisms such as LB plantarium, and acidophilus can help repair and maintain healthy intestinal linings (page 3, para. 0032-0036 and 0037). The product can be seen as a sports drink because it can be used by athletes, (para. 001) and absent any other ingredients, could be considered a sports drink because the reference discloses a liquid and the claimed bacteria.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which

said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

Claims 15, 25 and 33, 34, 35, 36, 37 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to claim 14 above, and further in view of Kurppa (WO 98/46091).

Kurppa discloses a sports drink and powder as in claim 15 which contains micronutrients such as potassium chloride and magnesium sulfate and other conventional ingredients found in a sports drink (abstract and page 5, Ex. 2). Therefore, it would have been obvious to use known conventional ingredients in the composition of the above reference to make a sports drink because sports beverages can contain protein and lactobacilli as disclosed by Connolly.

Claims 25 and 33 are now to a method of treating various gastrointestinal disturbances. However, as the claimed sports drink has been disclosed above, the various gastrointestinal disturbances would have been alleviated as the particular composition has been shown. Therefore, it would have been obvious to alleviate various symptoms by using a lactobacilli (LB) for its known functions.

Claims 34-37 require particular lactobacilli with particular deposit numbers. Connolly discloses the use of LB plantarum. Nothing new is seen in the particular strain of plantarum absent anything new or unexpected. Therefore, it would have been obvious to use a known LB in the claimed sports drink.

Claims 16-21, 26-29, and 32 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above references as applied to the above claims, and further in view of Molin (WO 89/08405) and Wilkes (Food Product Design).

Claim 16 further requires particular bacteria and claim 17 various micronutrients and claim 18 particular amounts of ingredients. Molin discloses a health drink that contains lactobacilli bacteria. The reference does not disclose the claimed particular bacteria. However, it does say that the composition is good for racehorses, which have something in common with athletes in needing particular foods to enhance endurance when running (abstract and page 2, lines 10-18). Connolly discloses the particular bacteria. Micronutrients as in claim 17 are disclosed on page 8 of Molin. Wilkes discloses that it is known to use minerals in beverages to improve athletic performance, page 1, and page 5, para. 2. The particular amounts are seen as within the skill of the ordinary worker depending on the degree of fortification required. Therefore, it would have been obvious to use lactic acid producing bacteria and micronutrients in particular amounts in the composition of the combined references because Connolly discloses that bacteria, which give a positive effect on the mucosa are known and can be used to enhance the health of athletes, and Molin discloses that it is known to use micronutrients in a health drink and sports drinks are also health drinks. Therefore, it would have been obvious to add micronutrients as disclosed by Molin to the beverage of Connolly, since they are known to be used in health drinks.

Claim 19 requires proteins and amino acids and claim 20 whey proteins. Proteins are well known in sports drinks, hence, large containers using particularly whey proteins are seen at health food stores. Connelly discloses the use of proteins in a beverage for athletes (col. 1, par. 0009). Also, Kurppa

discloses the use of the amino acid, glutamic acid in a sports drink (page 5, lines 7, in ex. 2). Therefore, it would have been obvious to use proteins and amino acids in the claimed beverage.

Claim 21 requires low glycemic type carbohydrates and optionally high glycemic index carbohydrates. This covers all carbohydrates. It would have been within the skill of the ordinary worker to use either one as the function of each type of carbohydrates in providing quick energy or long-term energy is well known. Therefore, it would have been obvious to use known types of carbohydrates in the claimed composition.

The limitations of claims 26-29 and 32 have been discussed above and are obvious for those reasons.

Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to the above claims and further in view of Masuyama (WO98/05343).

Claim 24 further requires the use of freeze dried lactobacilli with micronutrients in tablet form. Masuyama (WO98/05343) discloses that it is known to lyophilize (freeze-dry) lactobacillus and to form it into tables (page 9, lines 10-14). Therefore, it would have been obvious to treat lactobacilli as claimed in the composition of the combined references.

Claims 22, 23, 30 and 31 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combination of references as applied to the above claims, and further in view of Portman (6,051,236).

Claims 22, 23, 30 and 31 further require additional ingredients to make a beverage. Connolly discloses the use of milk protein or any other related protein along with probotic bacteria, which have a positive effect on the intestinal mucosa as above (page 1, para. 0007-0009). The claims do not exclude the use of even milk protein, because whey is a part of milk. Portman discloses the use of whey protein in sports beverages with ingredients within the claimed amounts except for the lactobacillus (col. 9, lines 40-65). Connolly discloses high levels of the claimed bacteria, which could amount to the amount claimed depending on the amount taken. (page 1, para. 0001 and col. 5, claim 15). Therefore, it would have been obvious to make a sports beverage containing the claimed ingredients as shown by Portman and to combine it with the beverage of Connolly because Connolly discloses that it is known to use the claimed bacteria in a sports beverage.

Allowable Subject Matter

The allowance of claims 22, 23, 30 and 31 has been removed in favor of the above art rejection.

ARGUMENTS

Applicant's arguments filed 11-3-04 have been fully considered but they are not persuasive. Applicants argue that the reference to the application that supports Connelly '-416 does not show para. 0070. However, this paragraph is not needed for the rejection of claim 14 and has been deleted from the rejection.

THIS ACTION IS MADE FINAL. Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 571-272-1404. The examiner can normally be reached on Monday to Friday from 9:30 to 6:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 703-872-9306.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-

direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Hp 12-27-04

H. Pratt

HELEN PRATT
PRIMARY EXAMINER